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No. 86-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, *et al.*,
Petitioners,

v.

JAMES W. KNEPPER, JR., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

LEROY S. ZIMMERMAN
Attorney General

THOMAS M. CROWLEY *
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

Office of the Attorney General
15th floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471
Attorneys for Respondents Knepper, Thieme, and Commonwealth of Pennsylvania

THEODORE M. LIEVERMAN *
ALLAN KANNER & ASSOCIATES
1616 Walnut Street, 22nd floor
Philadelphia, PA 19103
(215) 546-6661
Attorney for Respondents Pennsylvania AFL-CIO, et al.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Third Circuit correctly determined that the hazard communication standard promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 to protect manufacturing-sector employees does not preempt provisions of Pennsylvania's Right-to-Know Act calculated to protect the public at large—including consumers—and emergency-response personnel (police, firefighters, doctors, etc.).

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	i
STATEMENT OF THE CASE AND THE DECISION BELOW	1
ARGUMENT	4
CONCLUSION	11

TABLE OF AUTHORITIES

CASES: Page

De Canas v. Bica, 424 U.S. 351 (1976) 4
Farmer v. Carpenters, 430 U.S. 290 (1977) 9
Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., —— U.S. ——, 105 S. Ct. 2371 (1985) 4
Jones v. Rath Packing Co., 430 U.S. 519 (1977) 4
New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985) 6, 8
New York Tel. Co. v. New York Labor Dept., 440 U.S. 518 (1979) 9
Ohio Manufacturers' Association v. City of Akron, 801 F.2d 824 (6th Cir. 1986) 6
Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190 (1983) 9, 10
Perez v. Campbell, 402 U.S. 637 (1971) 8
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 8

STATUTES:

Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ..... *passim*
Pennsylvania Worker and Community Right-to-Know Act, 35 Pa. Stat. Ann. § 7301, *et seq.* ..... *passim*
Employees Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) 7, 8
Emergency Planning and Community Right-to-Know Act of 1986, 100 Stat. 1728-1747 5

OTHER:

H. Rpt. No. 99-962, 99th Cong., 2d Sess. 302 5

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BRIEF IN OPPOSITION

For the reasons stated herein, respondents believe that petitioners' request for a writ of certiorari should be denied.

STATEMENT OF THE CASE AND THE DECISION BELOW

The hazard communication standard was issued by the Occupational Safety and Health Administration ("OSHA") in 1983 under the Occupational Safety and Health Act of 1970 ("OSH Act") to protect "employees in the manufacturing sector." (Pet. App. E-1). The obligations the standard imposes apply only to employers in that sector. (*Ibid.*). The standard requires that those

employers educate workers in the manufacturing sector about hazardous substances produced or used in the workplace, through labeling, the provision of informational materials, and regular training. (Pet. App. E-9—E-18).

Pennsylvania's Right-to-Know Act, promulgated one year after OSHA issued its hazard communication standard, applies essentially to all individuals, partnerships, corporations, or associations doing business in the Commonwealth, including the Commonwealth and its instrumentalities. (Pet. App. F-2—F-5 defining "employer," "importer," "manufacturer," and "supplier"). The Pennsylvania statute—as further described below—establishes requirements and procedures designed to ensure that the *public at large* may obtain basic information about hazardous substances found within the Commonwealth. The statute also imposes certain obligations upon employers specifically designed to supplement the protections afforded to workers by OSHA's hazard communication standard.

The controversy before the Third Circuit focused upon Pennsylvania's regulation of producers and users of hazardous substances within the manufacturing sector.[1] In this regard, the Third Circuit held that OSHA's standard *does* preempt application in the manufacturing sector of those requirements of the Pennsylvania statute *specifically designed to supplement worker protections, viz.*, work-

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[1] Because OSHA's standard applies expressly only to the manufacturing sector, the district court had held that the standard does not preempt state regulation of employers outside that sector even for the purpose of protecting non-manufacturing *employees*. Petitioners contended before the Third Circuit that the standard preempts Pennsylvania's regulation of even business *outside* the manufacturing sector to the extent that Pennsylvania law requires the labeling of containers of hazardous substances and the provision of material safety data sheets (identifying the hazardous properties of such substances) to purchasers. (Pet. App. A-8). As developed more fully in text, the Third Circuit sustained these requirements as applied to *all* sectors because the provisions are an integral part of Pennsylvania's program to protect *public* safety and health generally.

place posting (Pet. App. A-17), workplace display labeling (*id.* A-21), furnishing of hazard information to employees (*id.* A-24), providing access to such information in the workplace (*id.* A-24), and education and training of employees with respect to workplace hazards (*id.* A-25).

The Third Circuit held, however, that the federal standard does *not* preempt state requirements applicable to the manufacturing sector calculated to protect the *public at large*. These requirements, now at issue before this Court, are designed to enable the identification of hazardous substances found within the Commonwealth, the development of basic information about those substances, and the dissemination of this information to consumers, to the public at large—through the Pennsylvania Department of Labor and Industry ("the Department")—and to emergency-response agencies (*e.g.*, police and fire departments) whose members must enter premises to prevent or contain emergencies that may involve hazardous substances.

In this connection, under the Pennsylvania statute, regulated industries must (1) label all hazardous-substance containers (Pet. App. A-18); (2) prepare material safety data sheets for all hazardous substances sold, identifying the substances and describing their hazardous properties (*id.* A-21); (3) furnish these sheets to purchasers and police, fire, or other emergency-response agencies (*id.* A-24); and (4) annually complete and—on request only—submit to the Department and state emergency-response agencies "hazardous substance surveys" about substances on the premises (*id.* A-11). The statute requires the Department to make the information so acquired available to interested members of the public, upon request, and to develop educational programs that will inform the public about hazardous substances used in the Commonwealth and about the rights of the public under the statute. (*Id.* A-12, A-25).

ARGUMENT

The principles that govern this case are well established. Those principles were properly applied by the Court of Appeals to the question presented here, and there is no conflict in the circuits. The petition for a writ of certiorari should therefore be denied.

1. This Court has repeatedly emphasized that preemption analysis must "start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, —— U.S. ——, 105 S.Ct. 2371, 2376 (1985) and cases cited. In cases such as this, the proponent of preemption must "present a showing . . . that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Id.* "[T]he proper approach is to reconcile 'the operation of both [federal and state] statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *De Canas v. Bica*, 424 U.S. 351, 358 n.5 (1976) and cases cited.

2. The Third Circuit correctly applied these principles in the circumstances of this case, in refusing to strike down, on preemption grounds, those requirements of the Pennsylvania Act calculated to promote *public* health and safety. Those requirements fall directly within the historic police powers of the states. *Hillsborough County, supra; Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Experience has repeatedly confirmed that many substances originating or used in the workplace present grave threats not only to workers who manufacture or handle such substances but also to community residents, consumers, other members of the public, and civil servants who provide services to sites where toxic substances are

found.[2] The state requirements sustained by the Third Circuit directly address these concerns. (Pet. App. C-4).

Specifically, these statutory measures ensure that hazardous substances used or sold within the Commonwealth are clearly identified, that businesses and individuals within the Commonwealth have access to basic information about these substances, and that the public, accordingly, may take steps to ensure that dangerous or even lethal substances are treated with proper regard. The provisions further ensure that members of the public and civil servants who must enter establishments where hazardous substances are found need not do so in ignorance and at their peril.

These measures, to be sure, may incidentally benefit workers who are exposed to the substances covered by the Pennsylvania statute. It is all but impossible, however, to conceive of any effort by the states to regulate toxic substances used, *inter alia*, in workplaces in order to protect state citizens generally that will not have such an incidental effect.

Thus, the burden of petitioners' preemption claim is that, in order to promote occupational safety and health, Congress intended that the OSH Act oust the states from exercising their historic police power over grave threats to the general public's health and safety posed by substances originating or used, *inter alia*, in workplaces. Nothing in the OSH Act or its legislative history provides any support for attributing such an unlikely intention to Congress.

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[2] Congress recently acted to meet these problems by enacting the Emergency Planning and Community Right-to-Know Act of 1986, creating a program of community access to information about toxic chemicals. 100 Stat. 1728-1747. This new law expressly provides that state or local laws are *not* preempted. Sec. 321, 100 Stat. 1747; see H. Rpt. No. 99-962, 99th Cong., 2d Sess. 302.

The OSH Act confers no authority upon OSHA to promulgate measures, such as those in dispute, that protect the public generally. OSHA is authorized to promulgate only "*occupational* safety and health standard[s]," which ensure "safe or healthful *employment* and places of *employment*." 29 U.S.C. § 653(8) (emphasis added). And Section 18 of the OSH Act precludes states from taking only such action as falls *directly* within this limited province. Specifically, that section preempts states (absent approval by OSHA) from "asserting jurisdiction under state law over any *occupational* safety or health issue with respect to which [a] standard is in effect . . . ." 29 U.S.C. § 667(a) (emphasis added). It is untenable to contend that Pennsylvania's action in safeguarding Pennsylvania consumers, residents of communities where toxic substances are found, other citizens at large, and state emergency-response agencies constitutes an assertion of jurisdiction over an occupational health issue committed to OSHA's regulatory authority. Thus, the Third Circuit correctly held in *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), where the court articulated the principles followed in this case:

> Because OSHA standards by definition govern occupational safety and health issues, they do not preempt state laws that regulate other concerns. The Secretary has authority to promulgate standards only as to occupational safety and health and those standards cannot have a preemptive effect beyond that field.[3] *Id.*, at 593.

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[3] Contrary to petitioners' assertion, the Third Circuit's decision in *Hughey* is not inconsistent with its decision in this case. The same court applied the same principles in each case. Any differences between the two decisions are attributable to differences between the state statutes involved, not to deficiencies or inconsistencies in analysis.

Nor does the Third Circuit's decision in this case conflict with the Sixth Circuit's decision in *Ohio Manufacturers' Association v. City of Akron*, 801 F.2d 824 (6th Cir. 1986), as petitioners suggest. That case addressed only whether OSHA's standard had any preemptive effect on local ordinances. The court expressly left open

Denying states the right to legislate in circumstances such as these would leave a gap in the regulation of health and safety issues. Neither the states nor OSHA would have authority to promulgate measures that would effectively protect the *public* against threats originating in the workplace. Far from intending this result, Congress' intent was plainly to avoid it by making clear in Section 18 of the OSH Act that the states are free to regulate where OSHA either *cannot* or *has not.*

Federal regulations, like federal statutes, may preempt state law; the test is whether the regulation shows an agency intent (consistent with the agency's statutory authority) to do so. The OSHA standard expressly notes that it is intended to "address comprehensively the issue of *evaluating and communicating chemical hazards to employees in the manufacturing sector*, and to preempt any state law pertaining to *this* subject." (Pet. App. E-1) (emphasis added). OSHA has clearly delimited the intended effect of its standard in a way that permits state regulation of nonmanufacturing workplaces and public access to hazard information.

3. Finding nothing in the OSH Act to support their position, petitioners insist that this Court's decisions construing the Employees Retirement Income Security Act of 1974 ("ERISA") are applicable to the OSH Act. Petitioners assert that just as ERISA preempts state laws having any connection with employee benefit plans, whether or not the state specifically intended to affect such plans, then by analogy the OSHA standard must preempt the provisions of state law challenged in this case. The analogy cuts just the other way. The sweeping preemption provision of ERISA, read in the light of unequivocal evidence—absent here—that Congress intended that ERISA broadly preempt state laws, makes clear by comparison that the much more narrow preemp-

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the question answered by the Third Circuit: whether provisions that address public protection may be severed from the balance of the statute.

tion provision of the OSH Act should not be construed to achieve the result petitioners seek.

As the Third Circuit noted in *Hughey, supra*, 774 F.2d at 593, ERISA's preemption provision broadly declares that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). In construing this provision, this Court has emphasized that Congress expressly rejected a proposal to provide for preemption of only those state laws that concern "specific subjects covered by ERISA," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983), opting instead for preemption in the "broadest sense" of "all actions of State or local governments" connected with employee benefit plans, *id.*, at 99, quoting 120 Cong. Rec. 29933. This Court's construction of ERISA implemented this Congressional objective.

By contrast, to leave no gaps in regulatory authority over health or safety issues, Congress as we have seen opted in the OSH Act for narrow preemption only of state attempts to "assert[] jurisdiction" over those specific "issue[s]" *both* falling within OSHA's focused regulatory authority *and* addressed by an OSHA standard in place. The Third Circuit properly implemented *this* Congressional purpose in addressing the relationship of the Pennsylvania law to the OSHA standard.

4. Petitioners further contend that in taking into account the purposes served by the challenged state legislation, the Third Circuit ignored this Court's admonition that a state's articulated purpose should not be dispositive in preemption analysis lest state legislatures be free to nullify "unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." (Pet., at 18, quoting *Perez v. Campbell*, 402 U.S. 637, 652 (1971)). This contention misconceives what the Third Circuit did in this case.

As we have shown, Section 18 of the OSH Act requires an analysis of whether the state has attempted in a particular instance to "assert[] jurisdiction" over an occupational safety or health "issue" regulated by OSHA. In conducting this analysis, the Third Circuit necessarily considered the objectives of the state legislation. The Court did so by examining the nature of the obligations imposed by the statute.[4] Once having determined that the state had not taken action falling within the scope of the applicable OSHA standard, the Third Circuit further considered whether the *effect* of the state law would nonetheless preclude compliance with the federal standard or would otherwise frustrate the accomplishment of the federal objectives. Only after determining that the Pennsylvania statute would have no such effect, did the court sustain the statute against petitioners' challenge.[5]

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[4] In determining whether federal law preempts state law in other contexts, this Court has regularly examined state-law objectives to determine whether the state has undertaken directly to regulate subjects committed exclusively to federal regulation. See, *e.g., Pacific Gas & Elec. v. Energy Resources Comm'n* 461 U.S. 190, 213-216 (1983) (sustaining state nuclear legislation after determining that it had an economic purpose rather than a safety-related one); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (sustaining state cause of action for intentional infliction of emotional distress in labor context); *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 518 (1979) (sustaining state payment of employment compensation benefits to strikers in order to effectuate general remedial purposes).

In fact, in *Pacific Gas, supra*, the Court explained that the basis for the Court's holding in *Perez*, upon which petitioners rely, is that "there was an *actual conflict* between state and federal law [that] frustrated accomplishment of the federal objective." 461 U.S. at 216-217 n.28 (emphasis added). Absent such a conflict, the Court held, the admonition of *Perez* was not "apposite." *Ibid.* As we explain in text, the Third Circuit specifically determined that no such conflict existed in this case.

[5] Petitioners incorrectly assert that the Third Circuit erred in deciding the issue of implied preemption based on an incomplete record. (Pet., at 19 n.12). Petitioners fully briefed the implied

It is not correct to state that the Third Circuit upheld provisions of the Pennsylvania statute if that court could discern "any other purpose" besides occupational health and safety to support them. (Pet., at 15-17). That statute's public safety objectives are manifest in the provisions sustained by the court below. As we have described (at pp. 3, 5, *supra*), these provisions together establish a cohesive overall scheme of public hazard communication.[6]

5. Petitioners and *amici curiae* object that, absent a holding here that OSHA's standard preempts Pennsylvania's statute across the board, the several states will be left free to enact and enforce varying regulations of toxic substances used, *inter alia*, in workplaces. This contention overlooks the fact that the states have the historic right to regulate public health and safety and that Congress, in enacting the OSH Act, quite plainly left the states free to continue to fill their traditional role, except in the narrow circumstances spelled out in Section 18 of that Act. And, as we have shown, the state requirements at issue here do not fall within that proscription. If petitioners and *amici curiae* desire broader preemption of state regulation than Congress saw fit to prescribe in

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preemption question before the Third Circuit and raised no concerns before the court about a supposed insufficiency of the record on this question.

[6] The Third Circuit's analysis is completely in keeping with that in *Pacific Gas, supra*. In focusing on the expressed intent of the Pennsylvania legislature, the Third Circuit made an interpretation of state law in which this Court "place[s] considerable confidence." 461 U.S. at 214. Even when state statutes "are subject to varying interpretations," the Court has declined to "become embroiled in attempting to ascertain . . . [the] true motive." *Id.*, at 216. Indeed, inquiry into legislative motive is "particularly pointless . . . when it is clear that the States have been allowed to retain authority" over other issues. *Id.* As noted above, nothing could be clearer than Congress' intent in Section 18(a) of the OSH Act to allow the states just such authority over issues not directly regulated by an OSHA standard.

the OSH Act, then they should take their case to Congress and not to the courts.

The Third Circuit, in sum, conscientiously applied well-settled preemption principles to the circumstances of this case, and petitioners have demonstrated no reason why the Third Circuit's decision warrants plenary review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

THOMAS M. CROWLEY *
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

Office of the Attorney General
15th floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471
Attorneys for Respondents Knepper, Thieme, and Commonwealth of Pennsylvania

* Counsel of Record

THEODORE M. LIEVERMAN *
ALLAN KANNER & ASSOCIATES
1616 Walnut Street, 22nd floor
Philadelphia, PA 19103
(215) 546-6661
Attorney for Respondents Pennsylvania AFL-CIO, et al.